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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

GILBERT MORENO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether evidence seized from a suspect's apartment pursuant to a valid search warrant must be suppressed on the ground that the agents executing the warrant violated 18 U.S.C. 3109, where the agents knocked and announced their authority and purpose at the wooden front door to the apartment rather than at a locked gate that separated the common hallway from a small alcove leading to the front door.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-8a) is reported at 701 F.2d 815. The opinion of the district court (App. B, *infra*, 9a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1983. A petition for rehearing was denied on June 10, 1983 (App. C, *infra*, 12a). On August 2, 1983, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and in-

cluding September 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT

Following a nonjury trial on stipulated facts in the United States District Court for the Southern District of California, respondent was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846.[1] He was sentenced to concurrent terms of five years' imprisonment, to be followed by a special parole term of ten years. The court of appeals reversed respondent's convictions, concluding that evidence seized in the

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[1] The indictment also charged co-defendants Joseph Anthony Marino and Charles Richard Moreno, respondent's son, with conspiracy to possess cocaine with intent to distribute it. In addition, respondent and Marino were charged with one count of distributing cocaine, in violation of 21 U.S.C. 841(a)(1), and respondent was charged with assaulting a federal officer, in violation of 18 U.S.C. 111, and with five weapons offenses, in violation of 18 U.S.C. App. 1202(a)(1). Following respondent's conviction on the cocaine possession and conspiracy charges, the additional counts against him were dismissed. Joseph Marino pleaded guilty to a superseding information charging him with use of a telephone to facilitate the distribution of cocaine, in violation of 21 U.S.C. 843(b); he was sen-

course of a warrant-authorized search of respondent's apartment should have been suppressed because of the alleged failure of the agents executing the search warrant to comply with the knock and announce requirements of 18 U.S.C. 3109.

1. The pertinent facts, which are not in dispute, showed that on January 20, 1982, undercover DEA Agent James Clem and a confidential informant negotiated a purchase of cocaine from co-defendant Joseph Marino. Marino directed Agent Clem and the informant to an apartment building where, Marino stated, his source of supply was located. After the informant and Marino entered the apartment building, the informant handed Marino $200 which he had previously received from Agent Clem. Shortly thereafter, other agents observed Marino approach respondent's apartment. Respondent came out of his apartment and escorted Marino inside. Approximately two minutes later, Marino emerged from the apartment and gave the informant two packages containing 1.2 grams of cocaine, which the informant delivered to Agent Clem outside the building. Agent Clem then discussed with Marino the possibility of purchasing cocaine in one-half ounce quantities. Marino stated that his source would have no problem handling sales of that size. Agent Clem and Marino agreed to meet at a later date to arrange another transaction. E.R. 39-41.[2]

A week later, law enforcement agents proceeded to respondent's apartment to execute a search warrant for evidence of respondent's drug distribution activi-

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tenced to imprisonment for one year and one day. Charles Moreno pleaded guilty to simple possession of cocaine, in violation of 21 U.S.C. 844, and was sentenced to two years' probation.

[2] "E.R." refers to the excerpt of record in the court of appeals.

ties.[3] Respondent lived in a 76-unit apartment building. Each apartment opened onto a common hallway. The wooden front door to respondent's apartment was recessed approximately six feet from the common hallway, creating an alcove of approximately 36 square feet. At the point where the alcove abutted the common hallway was an ornamental iron gate secured by a lock. The iron gate was constructed in such a way that the entire alcove area was visible from the common hallway. App. A, *infra*, 1a-2a; App. B, *infra*, 10a; Tr. 5, 9-11.[4]

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[3] The affidavit supporting the issuance of the warrant is reproduced at E.R. 28-32. In addition to relating the details of the cocaine transaction described above, the affidavit alleged, inter alia, that respondent was currently free on bail on a state narcotics charge and that the agents had received at least four anonymous telephone calls regarding suspected drug trafficking out of respondent's apartment. The calls indicated that respondent's apartment was visited on a daily basis by approximately 20 to 25 persons, each of whom would remain for only two to five minutes before departing. One caller stated that he had heard respondent brag about his drug dealing. The information concerning the numerous visitors to respondent's apartment was verified by agents who observed respondent admit at least 11 persons to his apartment within a one hour and ten minute period; each visitor remained inside for two to five minutes. In the agents' experience, this type of heavy traffic is common in places used for sales of drugs. E.R. 30-31.

Although respondent argued below that the affidavit failed to establish probable cause, the district court rejected this claim (App. B, *infra*, 9a), and the court of appeals did not address the probable cause issue. App. A, *infra*, 8a. Accordingly, for purposes of this petition, it must be assumed that the search warrant for respondent's apartment was valid.

[4] Photographs showing the arrangement of the gate and alcove area were introduced into evidence at the suppression hearing. Gov't Exhs. 1-4; Tr. 10, 12 ("Tr." refers to the transcript of the suppression hearing).

In the course of surveillance of respondent's apartment, law enforcement officers observed numerous visitors, each of whom used a buzzer on the wall adjacent to the iron gate prior to being admitted to the apartment by respondent, who would come out and unlock the gate and relock it as soon as the visitor entered. App. A, *infra*, 2a; E.R. 41. In addition, prior to executing the search warrant for respondent's apartment, the agents received telephone calls from several anonymous sources who stated that they had seen respondent bring firearms into the apartment. The agents also received information from local police that the occupants of the apartment were suspects in several assault investigations and that, during the preceding month, four shotguns had been reported stolen from the apartment. The local police advised the agents that the occupants of respondent's apartment should be considered armed and dangerous and that the agents should proceed with caution in entering the apartment. Tr. 6-8, 13-16.

In light of this information, the agents who executed the warrant approached respondent's apartment in a manner designed to avoid premature detection. After forcing open the locked iron gate with a crowbar, the agents entered the alcove. At the wooden door, one of the agents knocked, announced that he was a police officer with a search warrant, and demanded entry into the apartment. Co-defendant Charles Moreno, respondent's son, opened the door. The agents then entered and searched the apartment. Among the items seized were seven firearms, 5.8 grams of cocaine, financial records reflecting cocaine sales, $500 in cash, and an assortment of packaging materials and other paraphernalia used for the sale and consumption of cocaine. Tr. 11-12, 18, 24; E.R. 42-43.

2. Prior to trial, respondent moved to suppress the evidence seized from his apartment. He argued, inter alia, that the agents executing the warrant violated 18 U.S.C. 3109 by knocking and announcing their authority and purpose at the wooden door to the apartment rather than at the iron gate. E.R. 21; Tr. 29-31.

The district court denied respondent's suppression motion. App. B, *infra*, 9a-11a. The court observed that if the agents had announced their presence at the iron gate, "the occupants of the apartment would have had ample time to destroy any contraband." *Id.* at 11a. In addition, the court noted that the alcove "is open to public view at all times" and that respondent therefore could not claim a reasonable expectation of privacy within the alcove. *Ibid.* The court concluded that, by knocking and announcing their presence at the front door before gaining entry to the apartment, the agents complied with the requirements of Section 3109.

The court of appeals reversed. App. A, *infra*, 1a-8a. The court acknowledged (*id.* at 2a n.1) that there was no dispute that the agents complied with Section 3109 when they knocked and announced their authority and purpose at the wooden door to the apartment. The court held, however, that the agents violated the statute by failing to comply with the statutory knock and announce requirement at the iron gate. *Id.* at 3a-7a. In so holding, the court rejected, as "clearly erroneous," the district court's finding that respondent had no reasonable expectation of privacy in the alcove area. Noting that Section 3109 applies to windows and to glass or screen doors, all of which provide at least some visual access to the interior of a home, the court reasoned that the "ability to see into an area

does not defeat the occupants' privacy and security interests in it" for purposes of the statute. App. A, *infra*, 4a. The court observed that the alcove area was occupied exclusively by the residents of respondent's apartment, that nonresidents could gain entry to the alcove only by ringing the buzzer at the iron gate, and that respondent controlled access to the alcove by locking and unlocking the gate. These factors led the court to conclude that "the alcove was clearly a part of the apartment," that "[t]he gate protected [respondent's] privacy and security interests in the alcove, and the officers were therefore prohibited from forcibly entering the gate without complying with section 3109." App. A, *infra*, 5a (footnote omitted). In addition, the court expressed the view that the agents' use of a crowbar to pry open the gate was unreasonable because it resulted in the needless destruction of private property. *Id.* at 7a.[5]

The court of appeals then turned to the question whether the evidence seized pursuant to the warrant

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[5] The court of appeals rejected the district court's determination that the unannounced entry into the alcove was justified because any delay resulting from compliance with Section 3109 at the locked gate would have permitted occupants of the apartment to destroy contraband. App. A, *infra*, at 5a-6a. The court noted that the danger of destruction of evidence exists in every narcotics investigation and that there was no specific evidence here (such as "sounds of running feet") to support the suspicion that contraband would be destroyed. *Id.* at 6a. In addition, the court refused to consider whether the unannounced entry at the gate could be excused because the officers suspected that respondent was armed. *Id.* at 6a n.4. The court expressed the view that the district court "apparently did not credit" the testimony that respondent was believed to be armed and it stated that the government "ha[d] not renewed that claim * * *." *Ibid.*

following the agents' entry into respondent's apartment should be suppressed as the "fruits" of the Section 3109 violation. App. A, *infra*, 7a-8a. The court rejected the government's contention that the agents' compliance with the statutory knock and announce requirements at the front door dissipated the taint of the unlawful entry through the outer gate. The court explained (*id.* at 8a) that

> the Government tries to characterize as two separate searches what was instead one continuous law enforcement activity. The entry at the solid door occurred immediately after the forced entry and was made possible by that entry. The products of the search were therefore not "so attenuated as to dissipate the taint" of the illegal entry.

Accordingly, the court ruled that the evidence seized inside respondent's apartment should have been suppressed.[6]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals, suppressing evidence seized during the search of a suspect's apartment pursuant to a valid warrant, is manifestly erroneous in several critical respects. First, the court erred in holding that the agents violated 18 U.S.C. 3109 when—without first knocking and announcing their authority and purpose—they forced open the

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[6] The court of appeals did not specifically address the government's related argument that, in light of the fact that the agents clearly complied with Section 3109 at the front door of respondent's apartment, the alleged violation that occurred at the gate was at most a technical statutory violation that did not justify the drastic remedy of suppressing the evidence seized in the warrant-authorized search of the apartment. See Gov't C.A. Br. 26.

iron gate leading to the alcove outside respondent's apartment. As this Court has observed, Section 3109 "basically proscribes" an "unannounced intrusion into a dwelling." *Sabbath* v. *United States*, 391 U.S. 585, 590 (1968). Here, as the court of appeals itself conceded, the agents complied fully with the requirements of the statute before entering respondent's apartment: the agents did not force their way unannounced into respondent's dwelling; instead, after properly giving notice of their authority and purpose they were peaceably admitted into the apartment by respondent's son.

Contrary to the apparent view of the court of appeals, the statutory reference to the "outer doors" of a house does not require law enforcement officers to knock and announce at an exterior gate that does not provide direct access to the interior of a dwelling. To require otherwise would provide the occupants with greater opportunity to destroy evidence surreptitiously prior to the officers' entry, thus impeding execution of the warrant. In addition, officers awaiting entry at an outer gate would be in an exposed position in which they might be vulnerable to attack should the occupants choose to resist entry through force of arms. Thus, although the court of appeals sought to minimize the impact of its holding (App. A, *infra*, 5a n.2), we submit that the glaring nature of the court of appeals' error, and the dangers it poses to effective law enforcement, warrant review by this Court.

Moreover, the court of appeals erred even more egregiously in holding that the property seized inside respondent's apartment had to be suppressed as the "fruits" of the alleged statutory violation. This holding extends beyond the particular context of this case

and raises questions of broad applicability concerning the proper analysis of "fruit of the poisonous tree" issues and the appropriate remedy for technical violations of statutes regulating the conduct of law enforcement officers. It is undisputed that no evidence was discovered in the alcove area (to which, in the court of appeals' view, the agents gained entry unlawfully), that the agents complied to the letter with the requirements of Section 3109 before actually entering the apartment, and that all of the evidence at issue was seized inside the apartment after one of the residents voluntarily admitted the agents. In these circumstances, the agents' compliance with the statute at the front door to the apartment, and their peaceful entry, fully dissipated any taint from the violation—if violation it was—in forcing open the exterior gate without following the Section 3109 procedures. Furthermore, any violation that may have occurred constituted, at most, a technical statutory infraction that did not infringe any of respondent's constitutional rights. Particularly in view of the fact that Section 3109 does not itself contain an exclusionary sanction, such a sanction should not be imposed for an insubstantial violation that does not implicate constitutional concerns.

1. As the Court has noted on several occasions, Section 3109 is a codification of the common law rule that, in the absence of exigent circumstances, an officer may not forcibly enter a private dwelling until he has been refused entry after having given notice of his authority and the purpose of his visit. See *Sabbath*, 391 U.S. at 589; *Miller* v. *United States*, 357 U.S. 301, 306-309, 313 (1958). See also *Ker* v. *California*, 374 U.S. 23, 47-53 (1963) (opinion of Brennan, J.). The rule embodies " 'the reverence of the law for the individual's right of privacy in his house.' "

Sabbath, 391 U.S. at 589, quoting *Miller*, 357 U.S. at 313. Of course, a valid search warrant authorizes the officer to invade that privacy, and the individual has no right either to postpone the execution of the warrant or to refuse admittance to the officer. See *United States* v. *Bustamante-Gamez*, 488 F.2d 4, 11 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974).

Section 3109 is thus simply designed to regulate the manner in which a warrant may be executed, by establishing the general rule that an officer may not make a sudden, unannounced intrusion into a home. See *Sabbath*, 391 U.S. at 590. The statutory procedures provide the occupant with an opportunity to admit the officer voluntarily (as was done here) while, at the same time, reducing the likelihood for violent confrontations that might ensue following a forcible, unannounced entry. See *Miller*, 357 U.S. at 313 & n.12; *Sabbath*, 391 U.S. at 389.

Despite the fact that the agents complied with Section 3109 at the wooden door before entering respondent's apartment, the court of appeals held that the agents violated the statute by not giving notice of their authority and purpose prior to opening the iron gate. The court reasoned that the alcove area between the gate and the wooden door was a part of the apartment in which respondent enjoyed an expectation of privacy and security, and that the forcible opening of the gate contravened the statutory policy of avoiding needless destruction of private property. App. A, *infra*, 4a-5a, 7a. The court's reasoning is seriously flawed.

We submit at the outset that the court erred in its determination that respondent had a legitimate expectation of privacy in the alcove area. It is settled that an individual has no cognizable privacy interest

in that which is fully exposed to public view. See, *e.g.*, *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983); *Katz* v. *United States*, 389 U.S. 347, 351 (1967). As the photographic exhibits show (see note 4, *supra*), the iron gate provided respondent with no privacy in the alcove; any passerby in the common hallway of the building could look through the gate and see the entire area.

Quite apart from any theoretical analysis of expectations of privacy, which are largely overcome by the warrant itself, the court of appeals fundamentally misconstrued the statute in extending its reach to a structure such as the alcove gate in this case. Section 3109 requires an officer executing a warrant to give notice of his authority and purpose (and to wait until he is refused admittance) before breaking open "any outer or inner door * * * of a house." It seems to us rather obvious that the term "outer door" in the statute does not embrace an exterior gate, such as the one involved here, but instead is used to distinguish the door granting access to the interior of a residence from doors within a residence separating one room from another, which also may not be "broken" without a knock and announcement. See 2 W. LaFave, *Search and Seizure*, § 4.8(c), at 131 (1978). This construction is fully consonant with the statute's primary purpose of ensuring that an occupant's right to privacy in his dwelling is not invaded without warning. See *Sabbath*, 391 U.S. at 590.[7]

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[7] Although the wooden door leading directly into respondent's apartment was opaque, we recognize that Section 3109 does not apply solely to opaque doors. See App. A, *infra*, 4a. If, for example, only a screen or glass door separates the agents from the interior of a house, the agents should knock and announce at that door prior to breaking such a door to secure

Our reading is also consistent with the statute's secondary purpose of preventing violent confrontations between officers and the occupants of the residence. See *Miller*, 357 U.S. at 313 n.12; *Sabbath*, 391 U.S. at 589. The officers' safety may be seriously threatened if, following announcement, they must attempt to break through a series of exterior gates and doors to quell a violent response. The occupants, should they choose to resist, will have additional time to arm and barricade themselves. By the same token, if the officers experience unnecessary delays in entering the dwelling, they will find it more difficult to seize weapons and subdue the occupants. Law enforcement officers should not be required to confront these additional risks when executing a warrant.[8]

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entry. The point we wish to emphasize here—and the one that the court of appeals overlooked—is that the door that actually separates the interior living area of a dwelling from the outside is the "outer door" at which the statutorily required notice ordinarily should be given.

[8] These potential dangers are illustrated by this case, where the agents had reason to believe that respondent was armed and dangerous. If the agents had given notice from outside the gate and respondent had opened the wooden door with a gun in his hand, the agents would not have been in a position to seize the gun and neutralize the threat. Instead, respondent would have been able to prevent the agents from entering his apartment and executing the warrant. By knocking and announcing at the solid door instead of at the gate, the agents were in a better position to prevent (or deal with) a violent response. (The court of appeals erred in concluding (App. A, *infra*, 6a n.4) that the district court did not credit the testimony that respondent was believed to be armed. See Tr. 34. The district court apparently determined that there was no need to rely on that testimony in view of its finding that respondent had no legitimate privacy interest in the alcove area.)

In addition, requiring the officers to give notice at an exterior gate will diminish the effectiveness of a search by giving the residents a greater opportunity to destroy evidence or flee. Unlike officers who knock and announce at the front door of a dwelling, officers who announce at an exterior gate will be unable to hear sounds indicative of destruction of evidence or flight. Their ability to judge when a forced entry is necessary will be impaired.[9]

In sum, the knock and announce provisions of Section 3109 apply at the "outer doors" of a dwelling, but do not require law enforcement officers to give notice of their authority and purpose at an exterior gate that does not provide direct access to the interior living areas of the dwelling. By giving proper notice at the "outer door" prior to entering respondent's apartment, the agents fully satisfied the requirements of Section 3109.[10]

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[9] The court of appeals' assertion (App. A, *infra*, 6a) that there was no specific evidence in this case supporting the suspicion that contraband was being destroyed is therefore entirely beside the point. The decision below virtually assures that agents in similar situations will not be able to hear the telltale "sounds of running feet" or other suspicious noises that are indicative of the presence of exigent circumstances. As a practical matter, therefore, the only "privacy interest" that the decision below protects is that of occupants who are bent on either destroying evidence or resisting entry.

[10] In reaching its contrary conclusion, the court of appeals relied on its prior decision in *United States* v. *Fluker*, 543 F.2d 709 (1976). In *Fluker*, the court held that the defendant had a legitimate expectation of privacy in the common hallway that his apartment shared with another apartment. The court thus ruled that the agents were required to knock and announce at the exterior door of the building leading to the common hallway, and that they violated Section 3109 when

The court of appeals also stated that the opening of the iron gate violated the statutory policy of protecting private property from needless destruction. This conclusion is also unfounded. The record provides no support for the court's assumption that the gate was damaged by the forced entry.[11] In any event, whatever minimal damage there may have been to the gate does not justify the court of appeals' egregiously excessive response of suppressing evidence seized pursuant to a valid warrant following the agents' compliance with the statutory procedures.[12] It is to the court's imposition of this suppression sanction that we now turn.

2.a. It is well settled that suppression is not invariably required whenever evidence is obtained by law enforcement officers following the violation of a constitutional or statutory standard. Instead, this Court has held that, in order to justify suppression,

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they gave notice instead at the door to the defendant's individual apartment. *Id.* at 715-717. Like the decision here, the decision in *Fluker* is patently incorrect. "[W]hen the police intend to execute a warrant describing a particular apartment in an apartment building or a particular room in a rooming house, the notice must be given before entry of the door leading into the described premises even though that door is literally an 'inner door.'" 2 W. LaFave, *Search and Seizure, supra,* § 4.8(c), at 131.

[11] The evidence showed that the agents used a crowbar to separate the bars of the gate slightly, to a point at which the lock no longer "caught." Tr. 11, 18. Respondent has never claimed that the gate was damaged, and the photographs, which were taken on the night of the search (Tr. 37), show no damage to the gate. Gov't Exhs. 1-4.

[12] The inappropriateness of suppressing the evidence against respondent is further underscored by the absence of any proof that the gate was in fact respondent's property.

the evidence at issue must be the "fruit" of the illegal conduct. In determining whether evidence is a "fruit" of illegal conduct, the Court has eschewed a simplistic "but for" test of causation. See *Brown* v. *Illinois*, 422 U.S. 590, 598, 603 (1975); *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963). Rather, as the Court explained in *Wong Sun*,

> the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

371 U.S. at 488, quoting from J. Maguire, *Evidence of Guilt* 221 (1959). See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 106-110 (1980); *United States* v. *Ceccolini*, 435 U.S. 268, 274 (1978).

Here, the violation, if any, of Section 3109 occurred when the agents opened the iron gate and entered the alcove area without first giving notice of their authority and purpose. But none of the evidence at issue was obtained through exploitation of the entry into the alcove. The agents found no evidence in the alcove, and they complied with the statute before entering the apartment to execute the warrant. Thus, the evidence found inside the apartment was not obtained by "exploitation" of the violation. On the contrary, the agents quickly rectified any error by giving proper notice at the front door to the apartment. In response to this notice, respondent's son opened the door and allowed the agents to enter peaceably. These intervening events fully dissipated the taint arising from the initial illegality.[13]

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[13] *Segura* v. *United States*, No. 82-5298, cert. granted (Feb. 22, 1983), presents the somewhat similar question whether

The court of appeals rejected the government's "fruits" analysis, concluding that the unlawful entry into the alcove did not constitute "two separate searches" but "was instead one continuous law enforcement activity," and that "[t]he entry at the solid door occurred immediately after the forced entry and was made possible by that entry." App. A, *infra*, 8a. But the court's analysis fails to focus on the precise nature of the alleged violation. Although there was only one "search" of respondent's apartment, the search itself—which was conducted pursuant to a valid warrant—was not unlawful. Nor was the entry into respondent's apartment unlawful in and of itself. The only aspect of the agents' conduct that was even arguably unlawful was the entry into the alcove—and that entry did not result in the dis-

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evidence discovered and seized pursuant to a valid, untainted search warrant should be suppressed because the officers entered the premises unlawfully before the warrant had been issued. If the preliminary illegal entry in *Segura* does not require suppression of the evidence subsequently seized pursuant to the valid warrant, then clearly suppression should not be required here. Even if the Court were to conclude that suppression is required in *Segura*, however, a like result would not be compelled here. In several respects, the facts of the instant case weigh more strongly against suppression than do the facts in *Segura*. In *Segura*, the initial illegal entry was into the apartment itself, an area in which the residents undeniably had a legitimate expectation of privacy. Here, in contrast, the entry, even if illegal, was into a wholly visible alcove in which the residents had little, if any, cognizable privacy interest. Moreover, the officers in *Segura* had no warrant when they first entered the dwelling, whereas here the agents were armed with a warrant and clearly were entitled to enter both the alcove and respondent's apartment. Finally, unlike in *Segura*, there was no constitutional violation here; at worst, there was a technical statutory infraction.

covery of any evidence. Moreover, the temporal proximity of the initial violation to the entry into the apartment does not support the court's conclusion. On the contrary, the agents' announcement of their purpose and authority almost immediately after the initial violation ensured that the evidence subsequently seized inside the apartment was not come at by exploitation of the violation.

Similarly, there is no basis to the court of appeals' conclusion that the entry into the apartment was "made possible" by the initial entry. To begin with, as we have noted above, the Court has explicitly rejected this type of "but for" analysis in this context. In any event, the entry into the apartment was "made possible" not by the initial entry into the alcove, but by the opening of the front door to the apartment by respondent's son in response to the agents' announcement of their authority and purpose in compliance with Section 3109.

Finally, the court of appeals erred in failing to consider the "purpose and flagrancy of the official misconduct," which this Court has held is of particular relevance in considering whether evidence has been obtained by exploitation of illegal police conduct. *Brown* v. *Illinois*, *supra*, 422 U.S. at 604. See also, *e.g.*, *Rawlings* v. *Kentucky*, *supra*, 448 U.S. at 109-110. Prior to executing the warrant, the agents received information that there were weapons inside respondent's apartment and that the occupants should be considered armed and dangerous. The unannounced entry into the alcove was undertaken as a protective measure by the agents, who were advised to proceed cautiously when approaching the apartment. Given the fact that the agents did announce their purpose and authority before peaceably entering

the apartment, it is clear that the conduct of the agents here—assuming it was illegal at all—"does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of [evidence seized pursuant to a valid warrant]." *Rawlings* v. *Kentucky*, *supra*, 448 U.S. at 110.

b. Even assuming that the evidence at issue can be said to constitute the "fruits" of the agents' violation of Section 3109, suppression should not be required for a technical violation of a statute where constitutional concerns are not implicated. Here, the agents gave notice prior to entering respondent's apartment. At worst, they committed a technical infraction of Section 3109 by giving notice at the wrong door. This minor infraction does not call for the inflexible application of an exclusionary sanction, particularly since Section 3109 itself does not expressly provide for such a sanction.

This Court has noted that suppression is not invariably required for every insubstantial statutory violation, even where the statute does include an exclusionary remedy. See *United States* v. *Donovan*, 429 U.S. 413, 432-434 (1977); *United States* v. *Chavez*, 416 U.S. 562, 574-575 (1974); *United States* v. *Giordano*, 416 U.S. 505, 527 (1975). As the Second Circuit remarked, in determining whether inconsequential violations of Rule 41(c) of the Federal Rules of Criminal Procedure called for suppression, "courts should be wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude." *United States* v. *Burke*, 517 F.2d 377, 386 (2d Cir. 1975) (footnote omitted). The court in *Burke* concluded that evidence should not be suppressed unless the defendant was "prejudiced" by the infraction in the sense that the search would not otherwise have occurred or would

not have been so abrasive if the rule had been followed, or where there is evidence of an "intentional and deliberate disregard" of the rule. *Id.* at 386-387.[14]

Here, the agents' technical violation of the statute did not infringe any of respondent's constitutional rights. To the extent that the Fourth Amendment may require officers to give notice before entering a dwelling to conduct a search (see *Ker* v. *California*, *supra*, 374 U.S. at 38 (opinion of Clark, J.); *id.* at 54-59 (opinion of Brennan, J.)), the agents satisfied that requirement. In addition, neither of the justifications for suppression mentioned in *Burke* is present in this case. The unannounced entry through the gate did not make the search of the house more "abrasive." The agents gave notice of their authority and purpose before they were voluntarily admitted to the residence, where they conducted the search. Of course, the search itself was authorized by the valid warrant and clearly would have taken place if the agents had first knocked at the gate rather than at the door. Respondent had no right either to exclude the agents from his apartment or to prevent them from executing the valid warrant. See *United States* v. *Bustamante-Gamez*, *supra*, 488 F.2d

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[14] The *Burke* test has been adopted by most of the other circuits. See, *e.g.*, *United States* v. *Marx*, 635 F.2d 436, 441 (5th Cir. 1981); *United States* v. *Searp*, 586 F.2d 1117, 1124-1125 (6th Cir. 1978), cert. denied, 440 U.S. 921 (1979); *United States* v. *Mendel*, 578 F.2d 668, 673 (7th Cir.), cert. denied, 439 U.S. 964 (1978); *United States* v. *Gitcho*, 601 F.2d 369, 372 (8th Cir.), cert. denied, 444 U.S. 871 (1979); *United States* v. *Vasser*, 648 F.2d 507, 510-511 (9th Cir. 1980), cert. denied, 450 U.S. 928 (1981); *United States* v. *Pennington*, 635 F.2d 1387, 1389-1390 (10th Cir. 1980), cert. denied, 451 U.S. 938 (1981).

at 11.[15] Furthermore, the fact that the agents gave notice of their authority and purpose at the front door to the apartment is clear evidence that they did not act with an "intentional and deliberate disregard" of Section 3109.[16]

In short, if any statutory violation occurred here, it was insubstantial in nature. The court of appeals' imposition of the harsh sanction of exclusion was grossly disproportionate to the infraction and should not be permitted to stand.

3. We recognize that the court of appeals' decision on the Section 3109 issue does not appear to conflict with the decisions of this Court or of the other courts of appeals. Furthermore, we realize that the court's Section 3109 holding turns on a peculiar configuration of external barriers to entry and thus may not directly control a large number of other cases. Accordingly, we do not wish to exaggerate the practical importance of the decision on the Section 3109 issue. On

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[15] See also *Ker* v. *California*, *supra*, 374 U.S. at 39 (opinion of Clark, J.), quoting from *People* v. *Maddox*, 46 Cal. 2d 301, 306, 294 P.2d 6, 9, cert. denied, 352 U.S. 858 (1956):

> Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section [3109].

[16] The court in *Burke* noted that, in light of *Miller* v. *United States*, *supra*, it has generally been understood that the exclusionary rule applies to violations of Section 3109. 517 F.2d at 386 n.13. But this case, unlike *Miller* (or *Sabbath*, where the Court also suppressed evidence after finding a violation of Section 3109), is one in which the agents *complied* with Section 3109 before entering the premises. Thus here, as in *Burke*, the violation, if any, was insubstantial and does not warrant suppression.

the other hand, the court's treatment of the "fruits" issue is plainly contrary to principles settled by the decisions of this Court. The court below reached its result, which we believe is entirely unwarranted, by adopting an analysis that is inconsistent with the approach of this and other courts in limiting the availability of the exclusionary rule to those situations in which its purposes—principally the deterrence of police misconduct—are best served. The decision thus reflects the tendency of some courts to apply the exclusionary rule in a mechanical fashion, without regard to the societal costs entailed. We note that the Court has before it a number of cases that present questions concerning the applicability of the exclusionary rule in the context of constitutional violations.[17] Although the exclusionary rule questions in this case do not arise in a constitutional setting, they present issues of fundamental concern to the effective administration of criminal law in the federal system.

As we have shown in this petition, the decision of the court of appeals is methodologically unsound, misconstrues Section 3109, and is contrary to a proper understanding of both the "fruit of the poisonous tree" doctrine and the policies underlying the judicially-created exclusionary rule. We believe the errors of the court of appeals are sufficiently patent that the Court may view this case as appropriate for summary reversal.

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[17] In addition to *Segura* v. *United States*, *supra*, which raises a "fruits" issue (see note 13, *supra*), the Court has granted review in three cases to consider whether it should adopt a so-called "good faith" exception to the Fourth Amendment's exclusionary rule. See *Massachusetts* v. *Sheppard*, cert. granted, No. 82-963 (June 27, 1983); *Colorado* v. *Quintero*, cert. granted, No. 82-1711 (June 27, 1983); *United States* v. *Leon*, cert. granted, No. 82-1771 (June 27, 1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 82-1362

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GILBERT MORENO, DEFENDANT-APPELLANT

Argued and Submitted Feb. 11, 1983

Decided March 17, 1983

Appeal from the United States District Court
for the Southern District of California

Before ELY, HUG, and CANBY, Circuit Judges.

HUG, Circuit Judge:

Gilbert Moreno appeals his convictions for possession of cocaine with intent to distribute and conspiracy, 21 U.S.C. § 841(a)(1) and 846. Moreno was arrested when officers executing a search warrant at his home discovered cocaine and drug pharaphernalia. He sought suppression of the seized materials, contending that the officers who executed the warrant had violated the "knock and notice" requirement of 18 U.S.C. § 3109. We conclude that the district court erred in denying the suppression motion and that Moreno's conviction must therefore be reversed.

I

Moreno lived in a 76-unit apartment building in San Diego. Each apartment opened onto a common hallway. A wooden door that gave access to the in-

terior of Moreno's apartment was recessed approximately six feet from the common hallway. The recessed area, an alcove of approximately 36 square feet, was for the exclusive use of the occupants of Moreno's apartment. Windows of the apartment's bedrooms opened into the alcove. At the point where the alcove abutted the common hallway, and contiguous to the apartment's exterior walls, was an ornamental iron gate. The gate was kept locked, and only the apartment's residents could open it. It was impossible to enter Moreno's apartment without first gaining access through the gate.

Federal and local officers had conducted surveillance at Moreno's apartment. They observed frequent visitors, all of whom rang the door bell adjacent to the iron gate prior to being admitted to the apartment by Moreno, who would unlock the gate and relock it as soon as the visitor entered. No visitor was observed proceeding directly to the interior door, as the gate was always locked. Because of these observations, the officers who executed the search warrant carried with them a "jimmy." They crawled beneath the window adjacent to the gate, forced open the gate with the crowbar, and entered the alcove. At the solid door that opened onto the apartment's interior, the officers knocked and announced their intent to search the apartment.[1] They were admitted to the apartment by one of Moreno's codefendants. The apartment was searched and its occupants arrested.

In denying Moreno's suppression motion, the district court found that 18 U.S.C. § 3109 did not apply to the gate because Moreno had no reasonable ex-

[1] There is no dispute that the entry at the solid door complied with 18 U.S.C. § 3109.

pectation of privacy in the alcove area between the gate and the solid door. This was because the open nature of the gate permitted public view of the alcove from the common hallway. The court also found that "[if] the agents had knocked on the gate, it is doubtful whether or not the occupants of the apartment could have heard [them and if they] had been heard at this point the occupants of the apartment would have had ample time to destroy any contraband." We review the district court's factual findings under the clearly erroneous standard. *United States* v. *Wysong*, 528 F.2d 345, 348 (9th Cir. 1976). The issue whether 18 U.S.C. § 3109 is applicable on these facts is a question of law.

II

Section 3109 provides that:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The enforcement of these requirements serves three interests. First, it provides protection from violence, assuring the safety and security of both the occupants and the entering officers. *United States* v. *Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), *cert. denied*, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974); *see United States* v. *Fluker*, 543 F.2d 709, 716 (9th Cir. 1976). Second, it protects "the precious interest of privacy summed up in the ancient adage that a man's house is his castle." *Miller* v. *United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 1194,

2 L.Ed.2d 1332 (1958); *see Fluker*, 543 F.2d at 716. Finally, it protects against the needless destruction of private property. *Bustamante-Gamez*, 488 F.2d at 9; *see United States* v. *Crawford*, 657 F.2d 1041, 1045 (9th Cir. 1981).

The district court based its conclusion that section 3109 did not apply to the gate on the determination that Moreno had no expectation of privacy in the alcove area. After careful review of the transcripts and the photographic evidence, we conclude that finding is clearly erroneous. We do not believe it is decisive that passers-by in the common hallway could see into the alcove. It is clear that an outer door of a home need not be opaque to be entitled to the protection of section 3109. The knock and announce requirement applies if the door is made in whole or in part of glass or screen, so that the interior of the home is visually accessible. *See, e.g., United States* v. *Whiting*, 311 F.2d 191 (4th Cir. 1962), *cert. denied*, 372 U.S. 935, 83 S.Ct. 882, 9 L.Ed.2d 766 (1963). The statute expressly applies to windows, clearly indicating that officers' ability to see into an area does not defeat the occupants' privacy and security interests in it.

The facts do not support the district court's finding that the alcove was not an integral part of Moreno's apartment. The gate was controlled completely by the individual apartment owner. Nonresidents gained access to the alcove only by ringing a buzzer at the gate. The alcove was occupied only by the apartment resident, and was not held in common with the occupants of other apartments in the building. It was surrounded on three sides by the walls of the apartment, and windows from the rooms of the apartment opened onto the alcove. These are

similar to the factors we applied in *Fluker* to conclude the apartment residents had an expectation of privacy in the space between outer and inner apartment doors. 543 F.2d at 716; *see also United States* v. *Arboleda*, 633 F.2d 985, 991 (2d Cir. 1980), *cert. denied*, 450 U.S. 917, 101 S.Ct. 1362, 67 L.Ed.2d 343 (1981). Based on *Fluker*, we conclude that the alcove was clearly a part of the apartment. The gate protected Moreno's privacy and security interests in the alcove, and the officers were therefore prohibited from forcibly entering the gate without complying with section 3109.[2]

The district court also found that any effort to knock and announce would have been useless because it might not have been heard inside the apartment. No evidence supports this finding.[3] It is clear that other visitors to the apartment were able to notify the occupants of their presence by using the buzzer. The gate was immediately adjacent to one of the bedrooms and approximately six feet from the door, so that it is most likely that an announcement would have been heard. In addition, Moreno testified that he and others in the apartment did hear the gate open as the officers entered.

The district court further determined that compliance with section 3109 was excused because the de-

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[2] As in *Fluker*, 543 F.2d at 717, we emphasize that our holding is confined to the unique physical layout of this apartment. We do not suggest that all exterior gates are protected from entry by section 3109.

[3] In rejecting this finding, we do not intimate that the occupants' supposed inability to hear the announcement would necessarily excuse compliance with the statute. An attempt to notify by knocking and announcing complies with the statute whether or not it is heard.

lay would have permitted destruction of contraband. The existence of exigent circumstances, including the destruction of evidence, does excuse noncompliance with the statute. *Sabbath* v. *United States*, 391 U.S. 585, 591, 88 S.Ct. 1755, 1759, 20 L.Ed.2d 828 (1968); *United States* v. *Whitney*, 633 F.2d 902, 908 (9th Cir. 1980), *cert. denied*, 450 U.S. 1004, 101 S.Ct. 1717, 68 L.Ed.2d 208 (1981). However, the possibility of destruction of evidence exists in every narcotics investigation. In order to justify forced entry without an announcement of authority and refusal of admittance, there must be some evidence to support the suspicion that contraband will be destroyed. *Id.* at 910; *Bustamante-Gamez*, 488 F.2d at 12; *see generally* 2 La Fave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.8(d) (1978). In *Fluker* we suggested such evidence might consist of "sounds of running feet or other suspicious activity" or knowledge that the search was expected. 543 F.2d at 717. Our review of the record reveals no such evidence in this case. Moreover, the Government fails to explain why, if exigent circumstances existed at the time of the entry at the gate, they did not also exist when the officers reached the solid door. At that point they did knock and announce their purpose, apparently not suspicious that Moreno was destroying contraband. We therefore conclude that exigent circumstances did not excuse noncompliance with section 3109.[4]

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[4] There was some suggestion below that the officers suspected Moreno was armed, so that an unannounced entry was necessary for the officers' protection. *See Whitney*, 633 F.2d at 910; *United States* v. *McShane*, 462 F.2d 5, 6 (9th Cir. 1972). However, the district court apparently did not credit that testimony and the Government has not renewed that claim here.

We also believe it is important to consider this entry in relation to the third interest protected by section 3109—the needless destruction of private property. On these facts, we do not view as reasonable, in fourth amendment terms, the decision to pry open the outer enclosure of the apartment with a crowbar without first ringing the buzzer and affording the occupants an opportunity to let the officers in voluntarily. The Government has offered us no justification for the forced entry of Moreno's property.

III

Where officers executing a search warrant violate section 3109, the fruits of the search must be suppressed. *Miller*, 357 U.S. at 314, 78 S.Ct. at 1198; *Fluker*, 543 F.2d at 717. The Government asks that we apply that rule narrowly in this case, suppressing only the "fruits" of the forced entry through the gate, but admitting the products of the lawful entry through the solid door. It contends that because there is no nexus between the unlawful entry and the evidence seized, the second entry dissipated the taint of the unlawful entry. It also suggests that the "inevitable discovery" doctrine applies in that the seizure would have resulted in any event from the lawful entry through the solid door.

When there has been illegal police conduct prior to the seizure of evidence, the admissibility of that evidence depends upon whether "the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *United States* v. *Harris*, 501 F.2d 1, 6 (9th Cir. 1974), *quoting Wong Sun* v. *United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441

(1963). We have held that where an unlawful search is followed by a subsequent lawful search, the products of the latter search need not be suppressed because the "mere existence of fruitless unlawful searches does not taint a subsequent lawful one." *United States* v. *Haddad*, 558 F.2d 968, 975 n.6 (9th Cir. 1977); *see Harris*, 501 F.2d at 6. In those cases, the subsequent search was so independent of the first that it was "sufficiently distinguishable." In this case, however, the Government tries to characterize as two separate searches what was instead one continuous law enforcement activity. The entry at the solid door occurred immediately after the forced entry and was made possible by that entry. The products of the search were therefore not "so attenuated as to dissipate the taint" of the illegal entry. *United States* v. *Huberts*, 637 F.2d 630, 638 (9th Cir.1980), *cert. denied*, 451 U.S. 975, 101 S.Ct. 2058, 68 L.Ed.2d 356 (1981).

The "inevitable discovery" doctrine is also inapplicable here. That rule requires that the otherwise inadmissible evidence would have been discovered *independently* by legal means. *Id.* at 638-39; *United States* v. *Schmidt*, 573 F.2d 1057, 1065-66 n.9 (9th Cir.), *cert. denied*, 439 U.S. 881, 99 S.Ct. 221, 58 L.Ed.2d 194 (1978). Because we do not view the second entry as independent of the unlawful entry, we do not apply the "inevitable discovery" rule.

The district court erred in refusing to suppress the items seized in Moreno's apartment. In view of this conclusion, we need not address Moreno's remaining contention. The judgment is REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 82-96-T

UNITED STATES OF AMERICA, PLAINTIFF

v.

CHARLES RICHARD MORENO, ET AL., DEFENDANTS

[Filed Mar. 29, 1982]

ORDER DENYING MOTION
TO SUPPRESS EVIDENCE

The court after hearing the evidence and considering the argument of counsel and the points and authorities filed by the parties enters the following order:

1. *Legality of the Search Warrant*

The court has read the affidavit for search warrant issued by Magistrate Harris. The affidavit of Sherri F. Ackerman is sufficient to support a probable cause finding.

Defendant has failed to show that the affidavit contains a material false statement knowingly and intentionally made, or with a reckless disregard of the truth.

2. *Violation of 18 U.S.C. 3109* (knock and enter).

The search warrant issued upon probable cause authorized the search of an apartment complex 4465 Ocean Blvd., apartment No. 35. This complex is a four story multi family dwelling with 76 units (Govt. Exhibit 1). Each apartment opens onto a common hallway. Each apartment is entered, first by opening an ornamental iron gate which permits entry to a recess area of approximately 6 x 6 square feet. This area is open to the view of anyone using the common hallway (Govt. Exhibit 4). To enter the private living quarters of the occupants of Apt. 35 one must open the ornamental iron gate, proceed through the open entry hall and then through the solid door. In the instant case the agents used a "jimmy" to open the ornamental iron gate which was locked, went through the entry way to the solid door. The agents knocked and announced their presence. After a short wait the front door of the residence was opened by the defendant, Charles Moreno. The agents then entered the apartment and executed the search warrant.

18 U.S.C. 3109 provides in part that an officer may break open any outer or inner door or window of a house . . . if after notice of his authority he is refused admittance. In the instant case the defendant contends that the officers should have announced their presence outside the iron security gate and their opening of the security gate with a "jimmy" violated 18 U.S.C. 3109.

The defendant's position is interesting but is without merit. If the agents had knocked on the gate, it is doubtful whether or not the occupants of the apartment could have heard the officers. If the officers had

been heard at this point the occupants of the apartment would have had ample time to destroy any contraband. The entry way is not an integral part of Apt. 35. It is open to public view at all times. It does not appear to the court that the occupants of Apt. 35 had a reasonable expectation of privacy within this small entry way. There is no evidence that the occupants of Apt. 35 used the entry hall for any purpose commensurate with privacy. See *United States* v. *Fluker*, 543 F.2d 709 (9th Cir. 1976).

The court therefore finds that the agents in entering Apt. 35 complied with 18 U.S.C. 3109.

DATED: March 29, 1982.

/s/ Howard B. Turrentine
United States District Judge

Copy to:

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1362

D.C. No. CR-82-96-1-HBT
Southern California

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GILBERT MORENO, DEFENDANT-APPELLANT

[Filed Jun. 10, 1983]

Appeal from the United States District Court
for the Southern District of California

Before: ELY, HUG, and CANBY, Circuit Judges.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Canby have voted to reject the suggestion for a rehearing en banc, and Judge Ely recommends rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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